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IN THE

Supreme Court of The United States

OCTOBER TERM, 1963

NO. 35

ISRAEL DRESNER, AUSTIN M. WARNER, ROBERT M. BROWN, PETTY D. McKINNEY, MARTIN FREEDMAN, ARTHUR L. HARDGE, ROBERT J. STONE, WAYNE C. HARTMIRE, J. W. COLLIER, JR., RALPH L. ROY,

Petitioners,

vs.

CITY OF TALLAHASSEE,

Respondent.

RESPONDENT'S BRIEF ON QUESTION OF JURISDICTION

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November 2, 1963

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INTRODUCTION

This Brief is filed pursuant to instructions to counsel by Chief Justice Warren during the course of oral argument in this cause.

JURISDICTION

The jurisdiction of this Court is sought to be invoked by the Petitioners under 28 USCA, Section 1257, under Petition for Writ of Certiorari, and under which the first clause of said section reads as follows:

> "Final judgments or decrees rendered by the *highest court of a state in which a decision could be had* may be reviewed by the Supreme Court as follows: . . ."

QUESTION

WAS THE ORDER AFFIRMING JUDGMENTS ENTERED BY THE CIRCUIT COURT OF LEON COUNTY, FLORIDA, AFFIRMING CONVICTIONS IN THE MUNICIPAL COURT OF THE CITY OF TALLAHASSEE A FINAL JUDGMENT RENDERED BY THE HIGHEST COURT OF FLORIDA IN WHICH A DECISION COULD BE HAD UNDER THE LAW OF FLORIDA WITHIN THE PURVIEW OF 28 USCA, SECTION 1257?

Respondent respectfully urges this question be answered in the negative.

STATEMENT OF THE CASE

These Petitioners were tried, found guilty, and sentenced in the Municipal Court of the City of Tallahassee for unlawful assembly. (R.144) Petitioners sought to appeal this conviction directly to the Florida Supreme Court. On Motion To Dismiss, the matter was remanded to the Circuit Court of the Second

Judicial Circuit for Leon County, in which the municipality of Tallahassee is located. (R.153-156) Thereafter, the Circuit Judge entered an Order Affirming Judgment on August 16, 1962. Nothing else transpired until a Petition for Certiorari, Brief of Petitioner, and certain portions of the Record were field with the Clerk of the District Court of Appeal, First District, State of Florida, on October 16, 1962, which was on the sixty-first day after the entry of the Order of the Circuit Judge. This abortive effort at filing the Petition for Certiorari in the appropriate District Court of Appeal was unaccompanied by the necessary filing fee, and consequently, although received, never formally filed in the office of the Clerk. These items were returned to Mr. Tobias Simon pursuant to his request, all as more fully appears from Appendix E to the Respondent's Brief in Opposition to the Petition for Writ of Certiorari heretofore filed in this cause.

Petitioners now seek to have this matter reviewed by the United States Supreme Court on certiorari.

ARGUMENT

It seems without question that in Florida, a Circuit Court's appellate decision in a case appealed from a Municipal Court may be reviewed by certiorari in a District Court of Appeal. The Circuit Courts of the state are the proper appellate forums for the various Municipal Courts; this is clearly spelled out in both the state Constitution and in certain supplementing Statutes. Article V, §6 (3), of the Florida Constitution reads in part: ". . . The Circuit Courts . . . shall have final appellate jurisdiction . . . of all cases arising in municipal courts . . .".

The Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, which affirmed the judgments in these cases, is the primary trial court in Florida and has final appellate jurisdiction of all cases arising in Municipal Courts and no ap-

pellate proceedings lie in such cases from the Circuit Courts; but the Supreme Court and the District Courts of Appeal have express power to issue writs of certiorari which is a common law writ which issues in the sound judicial discretion of the Court to an inferior court, not to take the place of an appeal, but to cause the *entire record* of the inferior court to be brought up by certified copy for inspection in order that the superior court may determine from the face of the record whether the inferior court has exceeded its jurisdiction; or has not proceeded according to the essential requirements of the law in cases where no direct appellate proceedings are provided by law. *Davis et al vs. Strople* (*Fla. 1949*), 39 So.2d 468; also *Malone vs. The City of Quincy*, 66 Fla. 52, 62 So. 922, wherein certiorari is referred to in the following terms:

> "Certiorari is a common-law writ, which issues in the sound judicial discretion of the court to an inferior court, not to take the place of a writ of error or an appeal, but to cause the *entire record* of the inferior court to be brought up by certified copy for inspection, in order that the superior court may determine from the face of the record whether the inferior court has exceeded its jurisdiction, or has not proceeded according to the essential requirements of the law, in cases where no direct appellate proceedings are provided by law. *Seaboard Air Line Ry. v. Ray*, 52 Fla. 634, 42 South. 714; *Jacksonville T & K W. Ry. Co. v. Boy*, 34 Fla. 389, 16 South. 2.90; *Hunt v. City of Jacksonville*, 34 Fla. 504, 16 South. 398, 43 Am. St. Rep. 214."

This reference preceded our current judiciary Article V of the Florida Constitution creating the District Courts of Appeal. The District Courts of Appeal succeeded to much of the old jurisdiction of the Florida Supreme Court. Article V, § 5 (3) reads:

"DISTRICT COURTS OF APPEAL . . . (3) Jurisdiction.

Appeals from trial courts in each appellate district . . . may be taken to the court of appeal of such district . . . except those from which appeals may be taken direct . . . to a circuit court . . . *A district court of appeal may issue writs of certiorari* . . . and also all writs necessary or proper to the complete exercise of its jurisdiction" (this is recognized by Rule 2.2, F.A.R.).

This succession to jurisdiction by Florida's District Courts of Appeal was fully recognized by the Florida Supreme Court in a unanimous decision in *Robinson vs. State* (*Fla. 1961*), 132 So.2d 3, wherein the Court said:

"By the same token this Court no longer has extensive power to issue so-called 'common law writs of certiorari' to review judgments of lower courts. This power is now vested in District Courts of Appeal and Circuit Courts, by Article V, Sections 5 and 6, Florida Constitution. In situations in which review of a judgment or decree of a lower court is not otherwise provided for, the District Courts of Appeal are endowed with powers of review limited to a determination of whether the judgment constitutes a deviation from the essential requirements of the law. In a general way, this is the type of so-called common-law certiorari power exercised by this Court prior to the effective date of amended Article V, on July 1, 1957. . . . Our holding simply is that a judgment of a circuit court properly sitting in the exercise of its appellate jurisdiction is subject to review by petition for certiorari, not here, but in the appropriate District Court of Appeal.

• • • • • • • • • • •

"In the instant situation, as pointed out above, we are not authorized to review directly the decisions of a circuit court sitting as an appellate court. As an incident to the disposition of the matter, however, we have pointed out the constitutional impediments similarly applicable to the ap-

pellate jurisdiction of circuit courts in reviewing judgments of other trial courts which pass upon the validity of statutes. Under our constitutional system a district court of appeal is the only court which is authorized to issue a so-called common-law writ of certiorari in this instance. In so doing, that court may then properly consider the proposition that the circuit court, in the exercise of its appellate jurisdiction, in the instant case exceeded its constitutional power and, therefore, deviated from the essential requirements of the law. Any judgment rendered by the court of appeal may then be tendered to us for review under those provisions of Article V, Section 4, Florida Constitution, which authorizes us to review decisions of courts of appeal."

In that Petitioners included as an Appendix in their original Brief seeking certiorari the opinion entitled "*Israel Dresner et als, Appellants, v. City of Tallahassee, Appellee*" (Fla. 1961) 134 So.2d 228, without setting forth any reason for its inclusion, it seems appropriate to comment on the procedures involved in order that this Court not be left with the impression that this cause has proceeded appropriately to the highest Court in the state of Florida. In that proceeding directly from the Municipal Court of the City of Tallahassee, Petitioners sought to lodge this case in the Florida Supreme Court in 1961. They there contended that the trial judge had passed directly on the validity of a state statute, and sought to invoke the appellate jurisdiction of the Florida Supreme Court. The Florida Supreme Court held such an assignment to be erroneous, and treated the City's Motion To Dismiss the Appeal in the Supreme Court as a Motion To Transfer an Appeal improvidently invoked pursuant to Rule 2.1 (A) (5) (d) F.A.R. (Rule included in Appendix B of Respondent's Brief in Opposition to Petition for Writ of Certiorari.) The Florida Supreme Court, in referring the same to the Circuit Court, stated:

"Our opinion is not to be construed in any fashion passing upon the merits of the appeal or the sufficiency of the record, including the Notice of Appeal. These are matters to be disposed of by the Circuit Court in the exercise of its appellate jurisdiction." 134 So.2d 228, 230

Petitioners can not circumvent the review of the District Court of Appeal of Florida, First District, and the Florida Supreme Court by improvidently lodging their cause in the highest court of a state, and, when transferred to the proper court having jurisdiction, claim that the cause has already been there for review.

Under its system of District Courts of Appeal, Florida is divided into three Districts. Each of these District Courts has recognized their rights to grant certiorari to a Circuit Court where such Circuit Court sat exercising final appellate jurisdiction of a lower Court's decision under the Florida Constitution. See: First District: *State vs. Smith* (Fla. 1960), 118 So.2d 792; Second District; *King vs. State* (Fla. 1961) 134 So.2d 502; Third District: *State vs. Katz* (Fla. 1959), 108 So.2d 60; *Campbell vs. County of Dade*, (Fla. 1959) 113 So.2d 708; *City of Miami vs. Berman* (Fla. 1961) 129 So.2d 445.

The Court's attention is respectfully called to a scholarly consideration of the status of certiorari in Florida in a specially concurring Opinion by retired Justice Hobson, joined by a majority of the Court in *King vs. State* (Fla. 1962) 143 So.2d 458.

Therefore, the conclusion is inescapable that Petitioners here did not, in fact, seek review by certiorari to the United States Supreme Court from a final judgment rendered by the highest Court in Florida in which a decision could be had.

The untimely effort by Petitioners in lodging a Petition for Writ of Certiorari in the appropriate District Court does not constitute basis for this Court to consider this cause, because the District Court of Appeal at that point was without jurisdiction to entertain the late application pursuant both to Florida Appellate Rules and the appropriate case law. The Petitioners had slept on their rights, if any there were. *Harris vs. Condermann (Fla. 1959)* 113 So.2d 235.

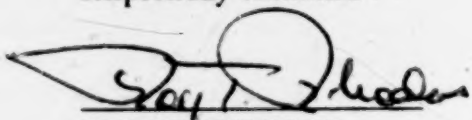
If there is a discretionary review available by a higher court within the state system, this Court has repeatedly held that the exercise of such discretion must be invoked. *Fisher vs. Perkins (Fisher vs. Carrico) (Kty. 1887)*, 122 U. S. 522; *Mullin vs. Western Union Beef Company (Colo. 1899)* 173 U. S. 116; *Stratton vs. Stratton (Ohio 1915)*, 239 U. S. 55; *Matthews vs. Huwe (Ohio 1925)*, 269 U. S. 262; *McMaster vs. Gould (N.Y. 1928)* 276 U. S. 284; See annotation at 7 L.Ed. 593.

As pointed out by Respondent in its Brief in Opposition to Petition for Writ of Certiorari (pages 6, 7) this is the third attempt in so-called "civil rights cases" to by-pass the highest court of Florida in which a decision could be had, and to have the United States Supreme Court grant certiorari to the Circuit Court of the Second Judicial Circuit of Florida. The other two Petitions for Writ of Certiorari were denied, presumably on the grounds urged by Respondent in this instance. See No. 783, *Speed vs. City of Tallahassee*, 356 U.S. 913, 2 L.Ed. 2d 586, 78 S.Ct. 670, March 17, 1958, Petition for Writ of Certiorari to the Circuit Court of Florida, Second Judicial Circuit, denied; and No. 671, *Steele vs. City of Tallahassee* and *Armstrong vs. City of Tallahassee*, 365 U. S. 834, 81 S. Ct. 748, 5 L. Ed. 2d 745, March 6, 1961, Petition for Writ of Certiorari to the Circuit Court of Florida, Second Judicial Circuit, denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Petitioners did not exhaust their state remedies, and, therefore, this Court has no jurisdiction, the judgment being supported by adequate state grounds.

Respectfully submitted



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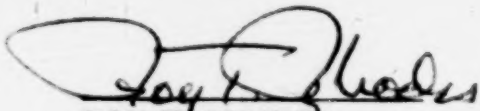
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief on Question of Jurisdiction has, pursuant to Rule 33 (1) of the Rule of the Supreme Court of the United States, been served by air mail upon TOBIAS SIMON, HOWARD W. DIXON and ALFRED I. HOPKINS, 223 Southeast First Street, Miami, Florida and CARL RACHLIN, 280 Broadway, New York, New York, Attorneys for Petitioners this .....2..... day of November, A. D. 1963.



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